

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN A. MANN)	
Claimant)	
VS.)	
)	
)	Docket Nos. 1,044,726
)	& 1,044,867
AMERICAN RED CROSS)	
and ALL SAINTS HOME CARE, INC.)	
Respondents)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY,)	
TECHNOLOGY INSURANCE COMPANY,)	
and MIDWEST INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Claimant appealed the December 4, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Docket No. 1,044,726 is a claim for a September 22, 2008 back injury sustained while claimant was working for the American Red Cross. Docket No. 1,044,867 is also a claim for an alleged back injury occurring on October 28, 2008, and each day worked thereafter while claimant was working for All Saints Home Care, Inc.

In the December 4, 2009 preliminary hearing Order, ALJ Klein denied claimant's request for treatment. The ALJ found that claimant did not prove she sustained accidental injury arising out of and in the course of her employment with either respondent.

Claimant requests the Board to reverse the December 4, 2009 Order. As stated in her brief to the Board:

When you combine the testimony of the claimant Susan Mann with the independent medical evaluation opinion of Dr. Paul Stein, it becomes clear that it is uncontroverted that on September 22, 2008 claimant suffered a work-related injury

while performing manual labor for the Red Cross and that claimant is in need of additional medical care¹

American Red Cross and its insurance carrier, Old Republic Insurance Company (Old Republic), contend claimant has failed to establish accidental injury arising out of employment. Even if the Board were to find that accidental injury arose out of employment with the American Red Cross (Red Cross), Old Republic and its insured argue the record is rife with evidence of aggravations, accelerations and exacerbations of back symptoms in claimant's duties with All Saints Home Care, Inc. (All Saints). Red Cross maintains the record shows claimant's subsequent and intervening duties with All Saints are the basis for her increased symptoms and need for additional medical care. Red Cross requests the Board to affirm the December 4, 2009 Order or at least affirm the Order as it pertains to the Red Cross and Old Republic.

Technology Insurance Company (Technology), which provided insurance coverage for All Saints for the period from October 28, 2008, through December 31, 2008, asserts the totality of the record establishes that claimant's alleged injuries to her back did not arise out of and in the course of her employment with All Saints. Technology and its insured maintain claimant's activities while working for All Saints did not result in a compensable injury arising out of and in the course of claimant's employment and that those job duties could not have been a significant factor in causing her back complaints. Technology and its insured contend claimant's testimony established that her low back complaints did not arise as a result of her work duties with All Saints and that claimant testified her duties with All Saints were much lighter than those at the Red Cross. Technology and its insured argue uncontroverted testimony and medical evidence support ALJ Klein's Order and request the Board to affirm the Order.

Midwest Insurance Company (Midwest), which provided insurance coverage for All Saints beginning January 2009, contends claimant failed to establish she sustained accidental injury arising out of and in the course of her employment with All Saints. Midwest and its insured argue claimant's testimony directly relates her low back symptoms to a September 22, 2008 incident with the Red Cross and that her position with All Saints is much less physically demanding. Midwest and its insured maintain the credible medical evidence establishes claimant's current symptoms are a direct and natural consequence of her injury while employed by the Red Cross. Midwest and its insured request the Board to affirm the December 4, 2009 Order.

¹ Claimant's Brief (filed Dec. 29, 2009) at 2.

The issue before the Board on this appeal is whether claimant suffered accidental injury arising out of and in the course of her employment with the American Red Cross and/or All Saints Home Care, Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant has alleged two injuries to her lower back. The first injury is alleged to have occurred on September 22, 2008, while claimant was working for the Red Cross. The second injury is alleged as a series beginning October 28, 2008, while working for All Saints.

Claimant's job with the Red Cross was traveling to various locations and setting up blood drives. Part of her job as a mobile unit assistant was responsibility for unloading and setting up equipment and supplies, which required heavy lifting. On September 22, 2008, while performing her job, claimant testified she experienced a sudden onset of lower back pain. Immediately before September 22, 2008, claimant was not having any problems with her back.

Claimant reported the injury to the Red Cross, which authorized claimant to be seen at Via Christi Occupational Medicine by Dr. Lisa H. Le. Claimant saw Dr. Le on September 24, 2008, and the doctor placed claimant on light duty and prescribed pain medication.

Claimant also saw her primary care physician on September 25, 2008, regarding her lower back pain.

The following week claimant quit her job at the Red Cross.

Claimant returned to Via Christi through authorization of the Red Cross for a follow-up appointment on October 14, 2008, and was seen by Dr. Steven R. Hughes. Dr. Hughes released claimant without restrictions.

Claimant remained off work until starting as a caregiver with All Saints on or about October 28, 2008. Claimant's job consisted of providing care for her mother, who lives with claimant. Claimant testified that the work she was doing for All Saints is much less physical than working at the Red Cross.

Claimant alleges she experienced a "flare-up" of lower back pain in mid-November and mid-December 2008 and mid-January 2009.

After reporting the injury to All Saints in the latter part of January or early February 2009, claimant was again sent to Via Christi. She was diagnosed with low back pain and lumbar strain.

At All Saints' request, Dr. John P. Estivo evaluated claimant on May 15, 2009. Dr. Estivo's report states: "It is my opinion that the patient's current complaints of lumbar spine pain are a direct and natural consequence of her original injury while working at the American Red Cross in 09/2008."²

Dr. Pedro A. Murati examined claimant at the request of her attorney on May 1, 2009. It is Dr. Murati's opinion that claimant's "current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on 10-28-08"³

The Court ordered an independent medical evaluation by Dr. Paul S. Stein. Dr. Stein's August 6, 2009 report states:

In regard to the initial incident at the Red Cross, it is difficult for me to state that there was, in fact, a work-related injury. . . . At this point I do not know the basis for her original back pain or the recurrent symptoms. From a medical viewpoint, all I can state is that there was onset after significant physical activity but I cannot clearly make a relationship between that activity and the back pain. . . .

. . . I cannot determine that the work activity through All Saints Home Care is a significant factor in the recurrent flare[-]ups of back pain the patient has had.⁴

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the various conditions on which that right depends.⁵ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁶

² P.H. Trans., Resp. Ex. 5 at 4.

³ P.H. Trans., Cl. Exs. 1 and 2.

⁴ Stein Report (Aug. 6, 2009) at 6.

⁵ K.S.A. 2008 Supp. 44-501(a).

⁶ K.S.A. 2008 Supp. 44-508(g).

The ALJ found and concluded that claimant did not prove she sustained accidental injury arising out of and in the course of her employment with either respondent. After considering all the evidence in the record this Board Member agrees.

The respondents and their insurance carriers ask the Board to affirm the ALJ's Order.

The claimant requests the Board reverse the decision of the ALJ.

Claimant argues when her testimony is combined with the opinion of Dr. Stein it is uncontroverted that she suffered a work-related injury on September 22, 2008.

It is true that Dr. Stein opines something happened to the claimant on September 22, 2008. But the doctor was unable to relate claimant's back pain to this alleged accident. He further opines that he could not determine that the work activity with All Saints was a significant factor in the recurrent flare-ups of back pain in the claimant. In short, Dr. Stein cannot conclude with medical certainty that either work activity is related to claimant's back pain.

Dr. Estivo opines the claimant's back pain is a direct and natural consequence of her September 22, 2008 alleged accident. Dr. Murati opines claimant's back pain is a direct result of the October 28, 2008 alleged accident.

Dr. Stein's opinion is accorded more weight since his evaluation was court-ordered.

The claimant has failed to sustain her burden of proof.

The ALJ's Order is affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the December 4, 2009 preliminary hearing Order entered by ALJ Klein is affirmed.

IT IS SO ORDERED.

⁷ K.S.A. 44-534a.

Dated this ____ day of February, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
David P. Mosh, Attorney for Red Cross and Old Republic
Bart E. Eisfelder, Attorney for All Saints and Technology
James P. Wolf, Attorney for All Saints and Midwest
Thomas Klein, Administrative Law Judge